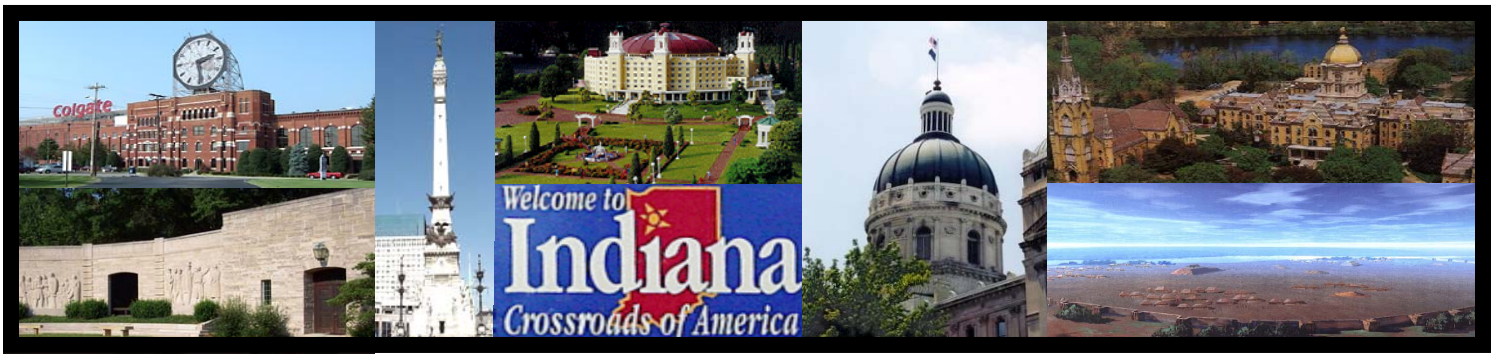
The Indiana Prosecutor July/August 2006



A Bit of Irony

Last month, the landmark decision *Miranda v. Arizona* marked its 40th Anniversary. In this 6-3 decision, Chief Justice Earl Warren made history by asserting that suspects must be informed of their rights under the US Constitution before being interrogated. While the words "you have a right to remain silent" are now part of colloquial conversation, in 1962 they were rarely used.

The facts leading up to the *Miranda* decision were fairly typical of criminal investigations at the time. In 1962, Ernesto Miranda lived in Phoenix, Arizona. A string of rapes and robberies occurred in the city and Miranda became a suspect after he was seen driving in the area of the crimes. Miranda was arrested at his home and taken to a Phoenix police station. He was lead into interrogation room #2 and questioned for two hours. Eventually Miranda confessed orally to the officers and was then provided a written form which included a typed paragraph indicating he fully understood his rights and that his confession was made voluntarily. A handwritten confession was then executed on this form. Both statements were introduced at trial. The officers testified at trial that Miranda had been advised that anything he said could be used against him. However, they did not tell him he had a right to consult with counsel. Miranda was convicted of kidnapping and rape and received a 20-30 year sentence.

When *Miranda v. Arizona*, was decided by the US Supreme Court they did so in conjunction with three other cases, *Vignera v. New York*, *Westover v. US*, and *California v. Stewart*. Imagine if the order had been different and Vignera was the lead case. We'd be referring to Vignera warnings instead. The latter cases involved suspects who had been interrogated for great lengths of time, Vignera over eight hours, Westover over fourteen hours and Stewart nine times over five days of incarceration. Each eventually confessed without being told of their right to seek counsel or adequately advised of their right against self incrimination.

Chief Justice Warren in apparent disgust spent pages of his decision quoting interrogation tactics from an interview training manual used by police. (Interestingly some of the tactics suggested back then are still in use today.) Focusing on the environment that surrounded interrogations and their psychological effect Warren wrote, "In the cases before us today... we concern ourselves primarily with this interrogation atmosphere and the evils it can bring." He noted that "the potentiality for compulsion is forcefully apparent, for example, in *Miranda*, where the indigent mexican defendant was a seriously disturbed individual with pronounced sexual fantasies..." suggesting that someone suffering from this apparent condition would be more easily lead into confessing, therefore, requiring the officers to ensure his statements were "truly the product of free choice."

To alleviate possible concerns that suspects would not speak to police if notified of their rights prior to interrogations, the Court noted that FBI agents during this period were already using a form of rights notification with apparent success. During oral arguments the Solicitor General was asked to provide the court with the FBI standards on giving warnings. What was provided is essentially what we refer to today as Miranda warnings. Chief Justice Warren wrote, "Over the years the

Continued on page 2

Inside this Issue

Enclosures

- Beyond Finding Words Brochure
- Illegal Drugs: New Problems, New Solutions Program Pamphlet

Federal Bureau of Investigation has compiled an exemplary record of effective law enforcement while advising any suspect or arrested person, at the outset of an interview, that he is not required to make a statement, that any statement may be used against him in court, that the individual may obtain the services of an attorney of his own choice and, more recently, that he has a right to free counsel if he is unable to pay."

Miranda's conviction, as were the others, was reversed and the case remanded back to the trial court. After a second trial, without his confession, Miranda was again convicted. Once released on parole Miranda tried to make some money by autographing and selling "Miranda warning" cards for $1.50. However, the good life didn't last long. In the ultimate irony, Miranda was stabbed to death in a bar fight. His attackers were read their Miranda Rights and chose to remain silent. They were never prosecuted. ❖

BMV Driver Records

The Indiana Bureau of Motor Vehicles is experiencing difficulties with its new computer system that are affecting the Official Driver Records. The Bureau is working to restore its ability to add convictions, suspensions, and other data to driver records and to remove expiring points, convictions, and suspensions as they are cleared. The Bureau has complete confidence in all driver records that are certified for use in judicial proceedings up to June 30, 2006. **However, driver records for the month of July may be incomplete and should not be certified for use in court at this time.**

The Bureau deeply regrets the problems this situation has caused for judicial officers and is working hard to fix the situation. The Bureau expects to have full functionality restored soon and will communicate with prosecutors promptly when it is. **For questions about individual drivers or records, please contact the Bureau at (317) 233-6000**. **The BMV Legal Department can be reached at (317) 232-7043.** ❖

Recent Decisions

U.S. Supreme Court

- Deprivation of a defendant's choice of counsel entitles him to reversal of his conviction.

U.S. v. Gonzalez-Lopez, 126 S.Ct. 2557, 165 L.Ed.2d 409 (6/26/06).

Cuauhtemoc Gonzales-Lopez was charged with conspiracy to distribute marijuana in Missouri. His family hired an attorney, John Fahle, to represent him. After his first court appearance, Gonzalez-Lopez called a second attorney, Joseph Low, who lived in California. Low agreed to represent the defendant and flew to Missouri. At the next hearing, both attorneys represented Gonzalez-Lopez under the condition that Low agree to file a motion for admission to the bar pro hac vice. During the hearing, Low passed a note to Fahle which was a violation of the court's rule prohibiting cross examination by more than one attorney. The magistrate revoked Low's temporary ability to practice in the court.

The following week, Gonzales informed his first attorney that he wanted Low to represent him solely. Fahle filed a motion to withdraw his appearance and then asserted that Low had violated the Missouri Rules of Professional Conduct by contacting a represented defendant without his attorney's consent. The court denied Low's Motion to practice pro hac vice on the grounds that Low had previously contacted another represented defendant without their attorney's consent. Gonzales was given time to hire another attorney.

Gonzales hired Karl Dickhaus. At trial, Dickhaus represented the defendant while Low was forced to sit in the audience. A bailiff sat between Dickhaus and Low to make sure that Low did not communicate with Dickhaus. Gonzalez was not able to meet with Low throughout the trial except for a short period of time on the last night.

The Supreme Court found that the abilities of an attorney were not important in determining whether the defendant was denied his Sixth Amendment rights. Justice Scalia writing for the majority said the Sixth Amendment "commands, not that a trial be fair, but that a particular guarantee of fairness provided-to wit, that the accused be defended by the counsel he believes to be best." It was irrelevant that Dickhaus may have been a competent attorney, because the Defendant's right was violated at the moment he was not allowed to be represented by his chosen attorney.

The amount of damage created by denying representation by an attorney of one's own choosing cannot be measured. Justice Scalia pointed out that another attorney may have been able to negotiate an acceptable plea agreement or may have employed a more effective trial strategy. Therefore by denying Gonzales the right to be represented by Low was a structural error. The only remedy was a reversal of the conviction.

Justice Scalia noted that this only applied to hired counsel and would not apply in situations where pauper counsel had to be appointed. It also did not apply where counsel was not a member of the bar or to a demand that the court honor a waiver of conflict-free representation. ❖

- *Davis v. Washington*, *Hammon v. Indiana*, 126 S.Ct. 2266, 165 L.Ed. 224 (6/19/06).

After a long awaited decision, the United States Supreme Court sent down their opinion on *Hammon* and *Davis*. The good news, the atrocities committed to Sir Walter Raleigh continue to remain a lesson in history; the bad news, victims of violence will bear the burden of the instruction.

Davis v. Washington is based on a 911 call placed by a domestic violence victim while the abuser was still in the home and potentially still violent. On first glance this decision looks hopeful: the 911 tape was considered properly admitted even though the victim did not appear at trial. However, the decision is based on certain facts that are not present in all 911 calls which will limit their use.

On February 1, 2001, Michelle McCottry called 911. She was disconnected before she could speak; so, the 911 operator reverse dialed. When the operator reached Michelle McCottry, Michelle informed the dispatcher that her boyfriend was "jumpin' her again." McCottry, in answering the operator's questions, disclosed that while she was at her house. Her boyfriend, Adrian Davis, was using his fist but he had not been drinking. During the call McCottry disclosed Davis had just run out the door. Officers arrived at the house within four minutes of the call and observed fresh inju-

Continued on Page 4

ries to McCottry. They described McCottry as "shaken" and that she had exerted "frantic effort to gather her belongings and her children so that they could leave the residence."

Davis was charged with a felony violation of a domestic no-contact order. McCottry did not show for trial. The State of Washington presented two police officers and the 911 tape as evidence. Davis objected to the admission of the 911 call on the basis that it violated his 6th amendment right to confront his accusers in court.

On February 26, 2003, police were called to Amy and Hershel Hammon's home. They found Amy on the front porch. She appeared "somewhat frightened." Officers asked her if there was a problem or if anything was going on to which she replied "no...nothing was the matter." After receiving permission to enter the house, Officers found a broken furnace with flames emanating from the partial glass front. The living room was in disarray with broken objects strewn around the floor. Hershel Hammon was in the kitchen. Hershel told officers that he and his wife had engaged in a verbal fight but that things had not gotten violent. As officers began to speak with Amy, Hershel attempted to participate in the conversation. Hershel became angry when he was told he had to stay separate from his wife.

Amy told officers that Hershel had broken things in the house including the glass front from the heater. He pushed her down, putting her face in the glass, and then punched her twice in the chest. Officers then instructed Amy to write out an affidavit of the event. She wrote the following "Broke our furnace & shoved me down on the floor into the broken glass. Hit me in the chest and threw me down. Broke our lamps & phone. Tore up my van where I couldn't leave the house. Attacked my daughter."

Hershel Hammon was charged with domestic battery and violating his probation. Amy did not appear at trial. The statement she made to police officers on the scene were admitted under the hearsay exception "excited utterance." Amy's affidavit was admitted under the present sense impression hearsay exception.

In following *Crawford v. Washington*, 541 U.S. 36, (2004), the court noted that the Sixth Amendment requires a criminal defendant to be confronted with the witnesses against him. Justice Scalia writing for the majority mused, "it is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause." When a witness' statement is testimonial and is presented in place of live testimony, the defendant's rights are violated. The key phrase is "testimonial." The Court in *Davis* and *Washington* attempts to better define what qualifies a statement as "testimonial."

The court held that "statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." Using this determination the Court found McCottry's statements to the 911 operator were nontestimonial while Amy Hammon's statement to the officer were viewed as testimonial.

In *Davis,* Scalia noted that McCottry was actively involved in an emergency situation when she was speaking to the 911 operator. She told the operator that Davis was present and was "jumpin" her. Therefore, the Court determined this witness was actively engaged in getting assistance and not making statements that were designed to serve as testimony. McCottry was speaking about the "here and now" and not about what happened previously. At one point in the call, McCottry told the operator that Davis had just run out the door. However, the 911 operator continued to speak with McCottry, asking pointed questions about Davis. During this portion of the tape, McCottry describes the context of the assault.

While the entire tape came into evidence at trial it appears that the Supreme Court might not agree that the whole tape could be considered as acting under the ongoing emergency situation that was present in the initial stages of the conversation. It is unclear, however, where the Court draws the line in this particular conversation. The Supreme Court includes the verbatim transcription of the tape to the point

Continued on page 5

where Davis runs out the door, which may be the limitation on what could be considered nontestimonial. There is certainly an argument to be made that Davis might return and therefore McCottry was continuing to seek assistance until it was certain Davis had left the premises. However, the Court's decision in *Hammon* indicates that a suspect's presence on the premises would not be a sole factor in determining an emergency situation.

When considering the facts in *Hammon,* the Court concluded that the emergency was over. When Amy Hammon told the officers that her husband had hit her she was telling the officers what had happened in the past, reporting a crime, and not seeking emergency assistance. Amy provided the officers the same information that she would have given at trial; therefore her statement was testimonial. Both the oral statement by Amy Hammon to the officers and the written affidavit were testimonial and inadmissible without Amy.

The only glimmer of hope for prosecutors is Justice Scalia's insistence that the rule of forfeiture wrongdoing acts as a waiver of a suspect's Sixth Amendment requirement that a witness be present in the courtroom before their testimony is considered. When prosecutors can demonstrate that the defendant has acted to prevent a witness from appearing in court, he forfeits his right to confront that witness. Forfeiture may be established in a pre-trial hearing where the rules of evidence do not apply. Therefore the prosecutor is free to rely on hearsay evidence to prove the premise. The Court took no position on the standard for the hearing, but Justice Scalia suggested that in previous federal cases the appropriate burden was by a preponderance-of-the-evidence standard.

It's important to note that *Hammon* and *Davis* apply only to statements made to police officers. The Court at this time has not applied the standard to statements to others although they hint that may occur in the future. Further, these cases also only apply when there is a Sixth Amendment right to confrontation. Therefore, *Hammon/Davis* will not apply to sentencing, bail, probation revocation or pre-trial evidentiary hearings. ❖

- The Fourth Amendment does not prohibit a police officer from conducting a suspicionless search of a parolee.

Samson v. California, 126 S.Ct. 2193, 165 L.Ed.2d 250 (6/19/06).

California's Parole Statute requires parolees to submit to suspicionless searches by a parole officer or peace officer at anytime. Cal. Penal Code Ann. 3067(a). The defendant, Donald Samson was on Parole for being a felon in possession of a firearm. As he was walking down the street with a woman and her child, Samson was stopped by a police officer who knew Samson was on parole. After a brief discussion with Samson the Officer searched him, finding a plastic baggie containing methamphetamine.

Samson was charged with possession of methamphetamine. During a Motion to Suppress, Samson argued California's Penal Code 3067(a) was unconstitutional, violating his Fourth Amendment right to be free from unreasonable searches and seizures. The US Supreme Court disagreed.

Justice Thomas writing for the majority noted that parole is an extension of prison. Quoting U.S. v. Knights, 534 U.S. 112 (2001), he noted "probationees have even more of an incentive to conceal their criminal activities and quickly dispose of incriminating evidence than the ordinary criminal because probationers are aware that they may be subject to supervision and face revocation of probation, and possible incarceration, in proceedings in which the trial rights of a jury and proof beyond a reasonable doubt, among other things, do not apply." Since parolees are on the continuum of state-imposed punishment they have fewer expectations of privacy than do probationers. When an incarcerated felon chooses release on parole to continued incarceration, he also chooses to abide by certain conditions during the balance of his sentence. Therefore, the Court concluded that the defendent did not have an legitimate expectation of privacy.

The Court noted California has a high level of recidivism among its parole population. Statistics indicated that 68% of California's parolees will be returned to prison. Reasoning that suspicionless searches of parolees assisted in reducing the rate of recidivism, the court concluded that the State's overwhelming interest in supervising parolees outweighed any privacy intrusions of this population. They concluded that the Fourth Amendment was not violated by the suspicionless search of a parolee. ❖

Indiana Court Decisions

Indiana Supreme Court

- *Kellems v. State (part ii)*, 849 N.E.2d 1110 (Ind. 6/29/06).

http://www.in.gov/judiciary/opinions/pdf/06290601fsj.pdf

The Indiana Supreme Court ruled recently that Luke Kellems was properly stopped by law enforcement officers who were acting on a tip by a concerned citizen. However, in deciding that case, the Court failed to review an additional claim raised by Kellems. Hence, the Court granted rehearing on the additional point.

Kellems claims that he did not knowingly and voluntarily waive his right to a jury trial. After a review of the record, the Supreme Court agreed and remanded the case back for a retrial.

The issue arose after an inadequate waiver by Kellems trial counsel. In a hearing with Kellems present, defense counsel told that court that he'd discussed a jury trial with Kellems who decided to waive the jury. The trial judge did not question Kellems directly to determine the voluntariness of his waiver.

Indiana Code 35-37-1-2 requires either a written or personal waiver by the defendant of his right to trial by jury. A lawyer can not waive jury on behalf of his client. The Supreme Court stated "we adhere to the general principle... that a knowing, voluntary, and intelligent waiver of the right to a jury trial required assent to a bench trial by defendant personally, reflected in the record before the trial begins either in writing or in open court. The record reflection must be direct and not merely implied. It must show the personal communication of the defendant to the court that he chooses to relinquish the right." ❖

- *Davidson v. State*, 849, N.E.2d 591 (Ind., 6/28/06).

http://www.in.gov/judiciary/opinions/pdf/06280601rts.pdf

Should the *mens rea* of voluntariness be an element of murder where the defendant took medication that may have caused a disassociative state rendering his conduct involuntary? No, said the Indiana Supreme Court in a unanimous decision.

Davidson was on trial for the murder of his ex-wife's new husband. Prior to shooting the victim, Mr. Davidson took a combination of Zoloft for depression and Ambien to induce sleep. He then drove over to his ex-wife's house and called her cell phone which caused her husband to go to the door. Once Davidson was in the house, he shot the victim stating "I can't take this anymore." The defendant was charged with murder.

At trial, Davidson's expert testified that a combination of Ambien and Zoloft can adversely affect a person's control over impulsive behavior causing one to become uninhibited. Davidson's theory was because he was unaware of this side effect when he consumed the medication he was acting involuntarily when he shot the victim.

Chief Justice Shepard found that this argument was more fitting of an intoxication defense than voluntariness defense. The voluntariness provision was designed to exclude actions that resulted from involuntary conditions such as convulsions, reflexive action, unconsciousness, hypnosis, or where the perpetrator is pushed into action by force. "If instead we treat intoxication as raising the question of voluntary conduct, the result would be that all intoxication would be a defense" which is contrary to legislative intent.

As a second issue, Davidson challenged his sentence under a Blakely argument. Davidson was sentenced prior to the legislative change replacing the presumptive "fixed term" with an "advisory sentence." At sentencing the Court found three mitigating circumstances but that each was outweighed by an aggravating factor. The imposition of a reduced sentence would depreciate the seriousness of the crime. The judge then gave Davidson the presumptive sentence of fifty-five years.

On Appeal, Davidson raised the issue "if a trial judge cannot find an aggravator to support more than a presumptive sentence, how can it use such a factor to offset mitigators leading to a presumptive sentence." Chief Justice Shephard noted that *Blakely* does not prohibit a trial court from finding aggravating circumstances. The problem arises when the Court finds aggravating circumstances and then sentences above the presumptive. Therefore here, since the trial judge sentenced at the presumptive, there was no violation. ❖

Indiana Court Decisions

Indiana Court of Appeals

- **Nonconsensual Warrantless Blood Draw Upheld By Court of Appeals**

Frensemeier v. State, 849 N.E.2d 157, (Ind. Ct. App., 6/9/06).
http://www.in.gov/judiciary/opinions/pdf/06090609jgb.pdf

On June 9, 2006, the Indiana Court of Appeals decided a case that revisited warrantless blood draws. In *Frensemeier v. State*, the defendant Lloyd Frensemeier was involved in an accident with another vehicle in Owen County. Frensemeier was driving one vehicle, and the other vehicle had an elderly man pinned inside.

Frensemeier told Owen County Deputy Sheriff Phillip White that he had consumed "a couple of beers" two hours before the accident at a party at Indiana State University. Deputy White observed that Frensemeier had an odor of alcohol on his person, had bloodshot eyes, and had slow manual dexterity. Frensemeier also told Deputy White that he may have fallen asleep at the wheel just prior to the accident. Deputy White did not administer any field sobriety tests and no PBT was given. Deputy White observed that Frensemeier's speech was clear, and testified that he did not think that Frensemeier was "really drunk."

Frensemeier was taken to Bloomington Hospital. Deputy White, believing that Frensemeier might be intoxicated, ordered a reserve deputy to have hospital personnel draw Frensemeier's blood for testing. The test revealed that Frensemeier had a blood alcohol content equivalent to 0.17 grams per 100 milliliters of blood. Frensemeier was charged with Operating While Intoxicated, a Class A misdemeanor. He moved to suppress the blood test evidence, and the trial court denied his motion. This case came before the Court of Appeals on certified interlocutory appeal.

Frensemeier alleged that the drawing of his blood without a warrant violated the Fourth Amendment and Article 1, Section 11. The Court of Appeals looked to *Schmerber v. California*, 384 U.S. 757 (1966), the landmark case for warrantless blood draws. In *Schmerber*, the Court held that the warrantless and nonconsensual taking of the defendant's blood was reasonable under the Fourth Amendment if: (1) the officer "plainly" had probable cause that the defendant had been operating a vehicle under the influence of alcohol, giving rise to probable cause that the testing of the defendant's blood would reveal the presence of alcohol, (2) the rapid diminishment of blood alcohol content after drinking stops justified proceeding with the search without first obtaining a warrant; (3) the blood test was a reasonable method of measuring the defendant's blood alcohol level; and (4) the test was performed in a reasonable manner.

The Court first examined whether Deputy White had probable cause that evidence of alcohol impairment would be present in Frensemeier's blood. When Deputy White ordered the blood draw, he knew that Frensemeier had been involved in an accident, his breath smelled of alcohol, his eyes were bloodshot, he admitted to drinking, his manual dexterity was slow, and he told Deputy White that he may have fallen asleep at the wheel. The Court considered these facts sufficient to show probable cause that evidence of alcohol impairment would be present in Frensemeier's blood.

The Court next considered the exigent circumstances that existed that would justify an exception to the search warrant requirement. The Court held that Frensemeier stopped drinking when he left the party. It took some time to get from Indiana State University to Owen County. It took additional time to get from Owen County to Bloomington Hospital. The Court also held that it would take some time for an out-of-county deputy to obtain a warrant from a Monroe County judge when there was no evidence that Monroe County had instituted a nighttime warrant procedure. For these reasons, the Court held that the rapid diminishment of blood alcohol content after drinking stops justified the warrantless taking of Frensemeier's blood, and, therefore, the blood draw did not violate the Fourth Amendment. The Court upheld the judgment of the trial court denying the defendant's motion to suppress.

The *Frensemeier* decision better clarifies what is necessary for probable cause than previous cases. While the Court cited *Hannoy v. State*, 789 N.E.2d 977 (Ind. Ct. App. 2003), which held that the amount of evidence needed to supply probable cause of operating while intoxicated is minimal ("the odor of alcohol on the driver's breath during the course of an accident investigation can be sufficient"), the Court in *Frensemeier* expressly held that the occurrence of a traffic accident coupled *only* with an odor of alcohol may not rise to the level of probable cause in all instances that would justify a warrantless blood draw.

Nonetheless, the Court found "routine" evidence of intoxication to be sufficient for probable cause, and upheld the blood draw on evidence of odor of alcohol, bloodshot eyes, slow manual dexterity and the defendant's statement that he may have fallen asleep at the wheel. There were no field sobriety tests performed and no PBT conducted. It should be remembered, however, that an officer must have the

Continued on page 8

requisite probable cause *at the time the blood draw is ordered,* and not later in the investigation.

A warrant should always be obtained for a nonconsensual blood draw. Nonetheless, if a warrant is not obtained, as long as exigent circumstances exist that make a warrant impossible before the blood alcohol diminishes significantly, and the officer ordering the blood draw has sufficient probable cause of intoxication and driving, a nonconsensual warrantless blood draw should be admissible. ❖

DID YOU KNOW...

.. . . . That you can go online to check the number of CLE hours you have earned and the number of hours needed. Go to this website:

http://www.in.gov/judiciary/attorneys/

Under the Continuing Legal Education Section is a link called "Check your CLE Records."

You will need your attorney number and pin number which is located on the blue or yellow sheet containing your attorney summary that you received in a mailing from the Indiana Commission for Continuing Legal Education. Please refer to this sheet before contacting the CLE to obtain this information.